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In The
Supreme Court of the United States
October Term, 1994

National Labor Relations Board,
Petitioner,

v.

Town & Country Electric, Inc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 292

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a person applying for or holding a job with an employer that he intends to organize, and who will be compensated by a union for his organizational activity, is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) and therefore protected against discrimination on account of his union activity and affiliation.

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IN THE
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NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
TOWN & COUNTRY ELECTRIC, INC., *et al.*, *Respondents*.

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BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 292 *

OPINIONS BELOW

The opinion of the Eighth Circuit appears in the Appendix to the Petition for a Writ of Certiorari (Pet. App.) at pp. 1a-11a and is reported at 34 F.3d 625. The decision and order of the National Labor Relations Board and the decision and recommended order of the administrative law judge appear at Pet. App. 12a-135a and are reported at 309 N.L.R.B. 1250.

* The International Brotherhood of Electrical Workers Local 292 was the Intervenor/Respondent in the court below and is, under Rule 12.4 of the Court's Rules, a party in this Court. This brief supports the position being taken by the petitioner and is therefore filed in tandem with the filing of the petitioner's brief.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition for writ of certiorari was timely filed.

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. § 152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

STATEMENT

1. *The Facts*

(a) Town & Country Electric, Inc. ("Town & Country") is the largest non-union electrical contractor in Wisconsin. In early September 1989, Town & Country obtained a contract for electrical renovation work at a paper mill in International Falls, Minnesota, with work scheduled to commence on Monday, September 11, 1989. Under Minnesota law, at least one electrician with a valid state journeyman's license must be employed for every two unlicensed electricians performing work on a job. Pet. App. 15a.

Town & Country, which did not employ any electricians with Minnesota licenses, retained Ameristaff, an employee leasing agency, to recruit electricians for the project. Ameristaff placed an advertisement in a Minneapolis newspaper seeking "licensed journeymen electricians." *Id.* at 15a-16a. Town & Country had informed Ameristaff that the project would be considered a "short-term" job and that applicants had to be willing to work on a non-union project. Accordingly, Ameristaff questioned persons who responded to the advertisements about their union affiliations, and then invited seven applicants to interviews at a Minneapolis hotel on September 7, 1989. *Id.* at 50a-52a. Officials from Town & Country and Ameristaff travelled from Wisconsin by chartered airplane for the September 7 interviews in Minneapolis. *Id.* at 52a.

(b) Members of Locals 292 and 345, International Brotherhood of Electrical Workers ("IBEW") learned of the job openings. Although the IBEW constitution generally prohibits members from working for a contractor not signatory to a union contract, the locals had adopted an exception to that policy, and permitted unemployed members to work for non-union contractors and to attempt to organize the jobsite.[1] The locals also had a fund to reimburse members who accepted such jobs for the difference between union scale and the lower wages and fringe benefits paid by non-union contractors. Pet. App. 16a.

Approximately a dozen Local 292 members went to the hotel where Town & Country was interviewing on September 7 to apply for jobs. Two of the members were journeymen electricians who were full-time union officers; the rest were licensed, journeymen electricians who were

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[1] The Local 292 resolution that permits work for non-union contractors, quoted in the Eighth Circuit's opinion (Pet. App. 9a-10a), has since been amended. For the Court's information, the new resolution appears as an Appendix to this Brief.

unemployed. *Id.* at 53a, 60a. (One of the seven applicants with pre-scheduled appointments also was present.) All of the prospects were asked to fill out applications. Town & Country began by interviewing a Local 292 member, who had told them he needed to leave early. The applicant with an appointment was then interviewed, but not hired. *Id.* at 54a-55a.

Ameristaff's president, who was at the hotel interviews, reviewed the remaining applications, which listed prior jobs with union-signatory contractors at union scale pay *Id.* at 60a; Jt. App. 226-27. He then informed the applicants that the job in question was non-union. The applicants responded that they were interested in any available work. Pet. App. 55a. After Ameristaff's president told the Town & Country interviewers that the remaining applicants appeared to be union members, further interviews were abruptly cancelled. *Id.* at 160a. The applicants were told that they could not be interviewed because they had no appointments. *Id.* at 55a-56a.

At that point, although no licensed electricians had been hired, the project was to begin in four days, and a dozen licensed journeymen were present, the interviewers prepared to fly back to Wisconsin. According to Town & Country, the sudden decision to cancel further interviews was made so that its Manager of Human Resources would not be late for an afternoon meeting back in Wisconsin. *Id.* at 18a.

(c) Malcolm Hansen, an unemployed, licensed journeyman who had been an IBEW member for 28 years, objected to the cancellation of the interviews. Hansen stated that he had called Ameristaff that morning and been told to show up at the hotel. After verifying that Hansen was telling the truth, Town & Country agreed to interview Hansen, but not anyone else. Pet. App. 18a-19a, 79a. At the interview, Hansen stated that he was a union member, but that he would accept employment with Town & Country. Hansen was given a job "out of [Town & Country's]

desperation, with knowledge of his union history." *Id.* at 77a. The ALJ found that:

> Hansen was a rank-and-file union member, who served that body in no official capacity. From all appearances, he was dependent financially on employment as a journeyman electrician in the construction industry. . . . Hansen's intention to organize was not incompatible with his basic employment needs and objectives . . . . [Pet. App. 107a.]

Hansen testified that he did not even learn that he would be reimbursed by Local 292 for the difference between non-union wages and union scale until after his employment with Town & Country ended. Jt. App. 68

(d) Hansen began work on the International Falls project on September 12. He was the only licensed electrician on the job site, and state inspectors allowed the project to go forward only because Hansen was present. On the first day of work, Town & Country gave Hansen a raise. After three days on the job, Town & Country terminated Hansen. Pet. App. 80a, 82a-85a.

Town & Country employees offered differing accounts of why Hansen was terminated, attributing the decision to Hansen's alleged failure to wear a hardhat, failure to have the proper shoes, low productivity, poor workmanship, inability to measure pipe, breakage of drill bits, saw blades, and a company band saw, and fomenting of "disharmony" among the crew. *Id.* at 86a-121a. The ALJ found that the attacks on Hansen's job performance were "a composite of lies" (*id.* at 110a), and that the only "disharmony" caused by Hansen stemmed from his protected union organizing activities, which Hansen refused to discontinue. *Id.* at 118a, 121a.

After Hansen's discharge, he received a payroll check from Ameristaff for his three days of work on the project, with federal social security contributions deducted. Jt. App. 201.

2. *Proceedings Below*

(a) *The Board*: The NLRB General Counsel issued a complaint on November 16, 1989, charging Ameristaff and Town & Country Electric as joint employers with violation of §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3) by refusing to interview and consider for hire the union members who applied on September 7, and by discharging Malcolm Hansen after three days on the job because of his union organizing activities.

After a hearing, the Administrative Law Judge concluded, first, that the employers' excuses for the refusal to interview most of the union members were simply "false plank[s] in [an] attempt to structure an explanation disassociating the sudden termination of the interview from disclosure that the waiting applicants were union members." Pet. App. 67a. The ALJ concluded further that the union members who filed applications would have been interviewed and considered if they had not been affiliated with the union. *Id.* at 69a.

Additionally, the ALJ, after exhaustively surveying the evidence, determined that Hansen "would [not] have been removed . . . if he had not engaged in organizational activity," and that Town & Country's attempt to establish otherwise "was structured on a thinly veiled attempt to mislead as to the true reasons for [their] action." *Id.* at 121a.

The ALJ as well rejected the employers' contention that the union members discriminated against were not "employees" within the meaning of the Act. *Id.* at 53a, 107a.[2]

[2] The employers' contention was that two of the applicants were not "employees" because they were full-time union officials at the time they applied for work on the Boise Cascade project while the remaining discriminatees, including Hansen, were not "employees" because they sought the job to further organizational interests and were entitled to reimbursement by the union for wage and benefit differentials between nonunion and union work. Pet. App. 53a-107a.

On these bases the ALJ held that the employers had violated §§ 8(a)(1) and (3) of the Act, and proposed appropriate relief. Pet. App. 128a-135a.

The employers' exceptions to the ALJ's decision included a reiteration of the argument that the employers were entitled to exclude the individuals in question in this case from employment on the Boise Cascade job with impunity because the discriminatees were not "employees" entitled to the Act's protections. The NLRB decided to hold oral argument in this case and another, *Sunland Construction Co.*, 309 NLRB 1224 (1992), in order to determine whether to adhere to its long-established understanding that individuals do not lose the Act's protections because they enter into employment with an intention to organize co-employees for a labor organization, or because they accept reimbursement from the union as consideration for their organizing efforts on the union's behalf. Pet. App. 13a. *See, e.g., Oak Apparel*, 218 NLRB 701 (1975). In addition to the respondents, the General Counsel, and the charging party (the union), the AFL-CIO and its Building and Construction Trades Department, the Chamber of Commerce of the United States, the Associated General Contractors and the Associated Builders and Contractors presented oral argument and (except for the Chamber) filed briefs. Pet. App. 13a.

The Board, on December 16, 1992, unanimously reaffirmed that individuals who work for an employer for a living and at the same time are "paid union organizers" [3]

[3] Although the Board uses the generic term "paid union organizer" in its opinions, this category, as the facts of this case illustrate and as we discuss later, includes individuals with varying connections to the union, varying employment situations, and varying financial arrangements. Additionally, the Eighth Circuit's holding does not appear to turn at all on whether the individuals excluded as non-"employees" are paid at all, and there has never been any explanation by proponents of the exclusion of the relevance of union financial incentives. Consequently, we will use the Board's terms for now, in quotations, but will argue later that the position

are "employees" under the NLRA. Pet. App. 14a. Specifically, in considering whether there is any basis for abandoning its well-established doctrine, the Board noted, first, that the term "employee" is defined in the NLRA, § 2(3), 29 U.S.C. § 152(3), as "any employee . . . not limited to the employees of a particular employer", and that both the ordinary and common law definitions of "employee" encompass individuals who are paid wages for work performed, without regard to whether the individual is also engaged by someone else. *Id.* at 22a-33a.[4] As to the purported policy reasons militating against the conclusion dictated by the statute's plain language, the Board emphasized that those reasons are largely based on premises squarely antithetical to those incorporated in the statute:

> The right to organize is at the core of the purpose for which the statute was enacted. No coherent policy considerations to the contrary have been advanced that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intentions to join or assist a labor organization. . . .
>
> The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.
>
> . . . . The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize. [Pet. App. 33a-34a, 37a-38a].

Additionally, the Board noted that its ruling would not "give paid union organizers carte blanche in the workplace"; insofar as any union organizers or activists, paid or otherwise, "violate[]valid work rules, or fail[] to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee." *Id.* at 38a.

Member Oviatt, who had dissented in an earlier case from the Board's hold that a "paid union organizer" is an "employee" within the meaning of Section 2(3) (*Escada (USA), Inc.*, 304 NLRB 845 (1991), *enforced mem.* 970 F.2d 898 (3d Cir. 1992)), reconsidered that position as a result of the arguments in this case and *Sunland* and "decided to join the majority . . . to find that paid union organizer[s] . . . are 'employees' entitled to the Act's protections." *Sunland*, 309 NLRB at 1231. Recognizing that there are "significant disadvantages to the nonunion employer of having to hire a paid organizer" (*id.* at 1232), Member Oviatt nonetheless concluded that he "lack[ed] authority to exclude paid union organizers from the definition of 'employee'." *Id.* As he put in his conclusion, "the legislative materials and Supreme Court decisions interpreting those materials simply do not provide support for a policy judgment to exclude union organizers from the definition of 'employee'." *Sunland*, 309 NLRB at 1232: "Accordingly, I believe that if paid union organizers are now to be excluded, Congress must say so explicitly." *Id.*

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of the Eighth Circuit, and of the employers in this case, would actually exclude from the Act's protections an extremely wide range of committed union adherents who aid their unions' organizational efforts at their workplaces.

[4] In all relevant regards, the Board opinions in this case and in *Sunland* are identical. The *Sunland* opinion went on to discuss an issue not raised by the facts of this case, namely, whether an employer is entitled to reject "paid union organizers" as employees during a strike. 309 NLRB at 1230-31. Additionally, Board members Oviatt and Raudabaugh each filed concurring opinions in *Sunland* and each concurred in this case "[f]or reasons set forth" in their concurring opinion in *Sunland*.

Member Raudabaugh concurred specially as well, noting that the conclusion that given individuals are "employees" under the Act does not necessarily establish a violation of § 8(a)(3) of the Act in refusing to hire that individual, since "[i]n order to establish a violation of that section, it must be established that the employer's action was unlawfully motivated." 309 NLRB at 1232.

(b) *The Eighth Circuit*: On review, the Eighth Circuit refused enforcement. The Court of Appeals regarded the case as involving two separate classes of individuals, "the two full-time union organizers" and "the other nine union members, including Hansen." Pet. App. 5a.

With regard to the first category, the court below maintained, contrary to the Board's conclusion after surveying the common law materials, that under ordinary common law principles, an individual loses the *status* of employee if he or she has any conflict of interest with the employer. *Id.* at 8a. As to the Board's contention that an interest in organizing a union cannot, under the Act, be considered to evidence a breach of a duty of loyalty to the employer, the Eighth Circuit maintained that "[w]hen a union official applies for a position only to further the union's interests, we believe that an inherent conflict of interest exists." *Id.* at 8a-9a.

The Eighth Circuit further found that the union members who were *not* full-time union officers lost their status as "employees" because they were encouraged by their union, while unemployed, to apply for employment with Town & Country and to organize Town & Country's employees if hired. Pet. App. 9a. The sole basis for this holding was the provision of the union's organizing resolution (unknown to the employer at the time of the refusals to hire and discharge) which reinstates the unions' usual prohibition on union members' working for nonunion employers if the union determines that the organizing activity should cease. *Id.* at 9a-10a; Jt. App.

257. The Eighth Circuit viewed that provision as "controlling, for third-party control over a putative employee's job tenure, in contrast to, say, an employee-initiated decision to engage in a work stoppage, is inimical to, and inconsistent with, the employer-employee relationship." Pet. App. 10a.

SUMMARY OF ARGUMENT

The discriminatees in this case either actually performed or were prepared to perform economically valuabe work for respondent, Town & Country Electric, Inc., under the company's sole direction as to the work tasks required, and to do so in exchange for wages. Ordinarily, individuals who have these characteristics are "employees" of an enterprise in ordinary parlance and for a wide variety of legal purposes, including the tax laws, tort law, and a myriad of employee protective statutes, state and federal.

The Eighth Circuit, however, held that where, as here, individuals who are otherwise employees have an arrangement with a union to actively organize fellow employees, that arrangement, depending upon its precise parameters, may divest the individuals of their employee status under the National Labor Relations Act (and, as far as appears, in all other legal contexts in which the same, traditional definition of "employee" used in the NLRA is applicable.) Specifically, the Eighth Circuit suggested that factors including pay for organizing activity by the union, taking an "employee" position with the intention to organize, an arrangement with the union to cease working as an employee at the union's instance, or the holding of a position as a union staff member before taking the "employee" position serve to divest the individual of NLRA "employee" status.

The consequences of this proposition, if adopted, are well illustrated by the facts of this case. Here, the employer was not aware, at the time it refused to hire the union member and union officer applicants and the later time it discharged Hansen, of any of the factors subse-

quently claimed to pretermit the discriminatees "employee" status. Rather, the employer acted with precisely the motive and effect proscribed by § 8(a)(1) and (3) of the NLRA; *viz.*, from the intent to exclude union members from employment because of their union background, and to eliminate any activism on behalf of the union from its worksites, and succeeded in so doing. The question before this Court is whether there is any support in the statutory materials for the conclusion that the employer was privileged to behave in this way because the individuals excluded or removed from the workplace were not "employees." We submit that there is not.

I. (1) The usual rule that the plain words of a statute, construed according to their ordinary meaning, govern statutory construction has special force with respect to the interpretation of § 2(3) of the NLRA, which defines the term "employee." That section was originally construed by the Board, with this Court's approval, quite flexibly, by focussing on the purposes of the Act and the nature of the underlying economic relationship. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). In 1947, however, Congress rejected this approach, and dictated instead an interpretation of "employee" based upon ordinary usage and common law understandings. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518 (1992).

Dictionary definitions of the term "employee" include all those who work for another under the latter's direction and control of the particulars of the work in return for wages, and obviously cover the discriminatees here. The legislative history of the NLRA, both in 1935 and in 1947, shows that the § 2(3) term "employee" and the coverage of the NLRA was explained in precisely these broad terms. Moreover, the § 2(3) definition has several express exceptions, some from the original Wagner Act and others added in 1947. This Court has consistently concluded that absent either an express exception or the

clearest of indications that Congress intended an exception of a certain kind, § 2(3) covers, as it explicitly states, "any employee."

The common law as it existed in 1935 (and at present) is fully consistent with the dictionary definitions of "employee" and the way the term was used by members of Congress at the time of enactment. The Restatement of Agency, frequently relied upon by this Court as the source for determining common law "employee" concepts, defines an employee consistently with the ordinary usage already discussed, without regard to an individual's motives in seeking or retaining employment or any understandings with a third party with regard to that employment. And, the Restatement expressly recognizes that an individual can be the employee of two employers with respect to the same or closely related acts.

While the Eighth Circuit read the common law otherwise, its analysis suffered from three fatal errors: That analysis failed, first, to distinguish between determining employee *status*, and determining whether an employee has *breached* any employee duty. The employee in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), for example, breached her duty of loyalty to her employer by taking confidential documents for her own use, but did not thereby lose her employee status as long as she continued to perform work for the employer in exchange for wages.

Second, the Eighth Circuit was wrong in suggesting that individuals such as Hansen in this case "abandon" their employment for the employing enterprise if they have an arrangement with the union that they will organize while employed. That arrangement in no way interferes with complete performance of the work assigned by the employing enterprise, and, according to common law understandings, the employee therefore has neither abandoned his job nor acted outstde his scope of employment by undertaking the organizing activity for the union.

Finally, the notion that organizing on behalf of a union breaches an employee's duty of loyalty or constitutes an irreconcileable conflict with the employer's interest simply flies in the face of the NLRA. The Act expressly protects employees who engage in organizing activity from employer retailation and thereby overrides any suggestion that such activity is a breach of a duty of loyalty to an employer.

II. Despite the clarity of the statutory materials, the employers in this species of case nonetheless have insisted that it is unfair and bad labor policy to treat individuals such as those here as § 2(3) employees. Any such arguments are, of course, more properly addressed to Congress. Moreover, for the most part the employers' articulated concerns, such as their concerns regarding adequate assurances of employee tenure can be dealt with through neutral rules applicable to employees generally that do not violate the NLRA.

The employer complaints that directly relate to the contested aspects of the relationship between the union and the employee-organizer are answerd by the NLRA itself. For example, employers may not define loyalty or commitment so as to preclude employee union activities such as workplace organizing activity. Nor can the employer insist that such activities can be engaged in only by an employee who has no prior union commitments, or is not subject to any initial union influence or supervision. To the contrary, as the Board and this Court have long recognized, the Act affirmatively permits unions to establish, and enforce rules that advance legitimate union interests, subject only to the caveat that the union member is free to resign from the union and then disobey the rule. Similarly, it has long been understood that the NLRA protects the right to hold union office, and precludes employers from imposing special conditions on union officers not applicable to union members generally.

Finally, the federal labor policy precludes the theory that employees lose their NLRA protections because they are recompensed in some way for engaging in activities otherwise protected by § 7. Section 302 of the Taft-Hartley Act expressly recognizes that individuals who work for an employer may also be paid by a union to engage in legitimate union activity. Indeed, this Court has recognized repeatedly in cases concerning charitable solicitation under the First Amendment that regulating a group's practice of paying those who engage in communicative activity on its behalf as an incentive for them to do so is presumptively invalid, given the likelihood that such regulation will chill the communication and quash the message.

ARGUMENT

Introduction

The individuals in this case, and in similar cases in which employers have raised similar arguments, either actually performed economically valuable work for an enterprise, under the enterprise's sole control as to the work tasks involved, the place and hours of work, and all other ordinary, day-to-day matters concerning the job, and did so in exchange for wages (here, in the case of Hansen) or were prepared and qualified to do so (here, in the case of the discriminatees who were refused hire).

It is common ground that should such an individual after being hired not fulfill the expectations the enterprise has for its employees—because she, for example, proves incompetent or insubordinate—nothing in the National Labor Relations Act limits the enterprise's right to dispense with her services. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1973).

Similarly, it is common ground that an enterprise that rejects such an individual as an applicant for employment *for a valid business-related reason*, including the reason that she would not perform her job task adequately, does not commit an NLRA violation. *Id.; Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186-87 (1941).[5]

At the same time—as this Court has recognized since the earliest days of the Act—where, as here, an employer

[5] *Phelps Dodge* holds that it is a violation of what is now § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3)—which prohibits "discrimination in regard to *hire* or tenure of employment to encourage or discourage membership in any labor organization" (emphasis supplied)—for an employer to discriminate on the basis of union activity in hiring individuals who, if hired, would be "employees" within the meaning of § 2(3) of the Act. Because, under *Phelps Dodge*, the protection according applicants under the Act turns upon their employee status if hired, we refer to both the one union member who was hired and the many who were turned away as "employees."

is engaged in purposely erecting an "embargo against employment of union labor," the result is "notoriously one of the chief obstructions to collective bargaining." *Phelps Dodge Corp.*, 313 U.S. at 186. That being so, said the Court, "[i]ndisputably, the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act." *Id.*

And, it is equally well-settled that individuals hired by an enterprise as "employees" and covered by the NLRA have, while employed, the right to communicate with other employees regarding union organization during nonworking time, and to distribute union literature on nonworking time in nonworking areas, but not, if the employer adopts a valid "no solicitation" rule, to engage in union organizing activity during work time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491-94 (1978).[6]

Against this legal background, it is very much to the point that in ordinary parlance—and for every legal purpose of which we are aware—individuals who perform work on a behalf of an enterprise under the control of the enterprise as to the details of the work to be performed and as to conformance to valid workplace rules, and do so in exchange for wages, are "employees" and that the enterprise is an "employer."

The enterprise as an "employer", for example, is liable in tort as *respondeat superior* for any damage negligently caused by such an "employee." *See* William L. Prosser *Handbook of the Law of Torts*, § 69 at p. 472 (3d ed. 1964). Under the tax laws, the enterprise as an "employer" is required to pay social security (FICA) and

[6] The National Labor Relations Board's standards governing the validity of no-solicitation and no-distribution rules are presumptive only; employers may be able by presenting evidence of special circumstances to sustain broader prohibitions, *See, e.g., Beth Israel*, 437 U.S. at 494-95; *NLRB v. Baptist Hospital*, 442 U.S. 773, 779-80, 785 (1979).

federal unemployment (FUTA) taxes and to withhold income taxes for such an "employee." 26 U.S.C. § 3401(c) (income tax withholding); 26 U.S.C. § 3121(d) (FICA); 26 U.S.C. § 3306(i) (FUTA); *see also* Rev. Rul. 87-41, 1987-1 Com. Bull. 296.[7] The Fair Labor Standards Act requires the enterprise as an "employer" to pay such an "employee" certain wages, including overtime past specified hours worked. 29 U.S.C. § 203(e), (g). The employment discrimination laws apply to such an "employee" as does the Family and Medical Leave Act. 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 2000e(f) (Title VII); 42 U.S.C. § 1211(4) (ADA); 29 U.S.C. § 2611(3) (FMLA). The Occupational Safety and Health Act sets standards for the protection of such an "employee" from harm. 29 U.S.C. § 652(6). And, the Employee Retirement Income Security Act (ERISA) governs the provision of health, retirement, and other benefits to such an "employee." 29 U.S.C. § 1002(b).

The proposition adopted by the court below, however, and urged in this Court by the employers and *amici* appearing in their behalf is that certain relationships with a labor union can divest individuals, who are otherwise indistinguishable from other "employees," of their "employee" status.[8]

The aspect or aspects of the relationship with a labor union which results, under this theory, in divestment of

[7] In this case, Hansen's paycheck from Ameristaff shows that Social Security taxes were, in fact, withheld from his pay. Jt. App. 201.

[8] The Eighth Circuit did not indicate whether or not the individuals in question would also become, on its reasoning, nonemployees with regard to the various other legal contexts described above in which employee status is relevant. As we show below, however, since the same concepts govern the determination of who is an "employee" in most of these contexts, the only logical conclusion is that the same exclusion from the protections (and responsibilities) of these various legal requirements would pertain in those contexts.

"employee" status are not clearly and carefully delineated in the decision below. But, as we understand that decision, it appears to rest on one or more of the following factors: (a) an agreement or understanding with the union (whether applicable to the individual alone or to union members generally) to enter into an employment relationship with an employer with the intention, once hired, to engage in union organizing activity (on nonwork time and in the locations available to other employees for union activities under the NLRA); (b) union payment in any amount to the individual in consideration for engaging in any union-related activities at the workplace, whether or not the individual initially took employment with an intention to engage in such activities; (c) an agreement with the union to cease working for the nonunion employer at the union's direction, for union-related reasons; (d) union employment as an organizer, along with any of the foregoing circumstances.[9]

[9] The many Board cases in which employers have contended, unsuccessfully, that pro-union individuals are not "employees" covered by the Act show a broad continuum of possible relationships, financial and otherwise, between those active in an organizing campaign and a labor union, that includes individuals: (a) who sought the job with the intention of organizing and would not receive compensation from the union, *e.g. Baltimore Steamship Packet Co.*, 120 NLRB 1521, 1533 (1958) (crew members accepted lower paying jobs to organize their co-workers); *Willmar Electric Service, Inc.*, 303 NLRB 245, 245 (1991) (union organizer who planned to take leave of absence from union while employed, and did not know if he later would be paid by union for his work); (b) who did not seek the job with the intention of organizing, later became active in an organizing campaign and were paid small amounts by the union for expenses or their time, *e.g., Elias Bros. Big Boy, Inc.*, 139 NLRB 1158, 1164-65 (1962) (waitress paid $15 per week by union as reimbursement for expenses); *Elias Bros. Big Boy, Inc.*, 137 NLRB 1057, 1073-75 & n.16 (1962) (waitress approached union about organizing coworkers and was paid $20 to pass out leaflets); *Hollbrook Knitwear, Inc.*, 169 NLRB 768, 771 (1967); (c) who sought the job, in part, in order to organize their co-workers and also received

The Eighth Circuit unequivocally held that individuals in categories (c) and (d) are not NLRA "employees". It also held, seemingly, that individuals in category (a) are outside the Act without regard to whether or not they were previously paid union officials or are paid by the union while organizing. *See* Pet. App. 8a (individuals were not "employees" because they "wanted to enter Town & Country's work force not for financial gain, but to organize its workers.") And, while the Eighth Circuit opinion does not directly address the question whether simultaneous union pay alone divests an individual of "employee" status, the employers' arguments throughout the line of cases culminating in this case have stressed the *paid* status of the individual in question, and have made the receipt of union pay for organizing while on the job a primary basis for the claimed divesture of § 2(3) "employee" status. *See cases cited* in note 9, *supra*.

None of these factors, it is important to note, have any bearing whatever on the individual's day-to-day per-

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pay from the union, *e.g.*, *Sears, Roebuck and Co.*, 170 NLRB 533, 533, 535 n.3 (1968) (paid union organizer took the job "to organize and also to make some extra money"); *Dee Knitting Mills, Inc.*, 214 NLRB 1041, 1041 (1974); (d) who sought the job for the purpose of organizing their co-workers and were paid by the union, *e.g.*, *Margaret Anzalone, Inc.*, 242 NLRB 879, 884-86 (1979) (union organizer who was "a competent and versatile machine operator" while employed); *H.B. Zachary Co.*, 289 NLRB 838, 838 (1988) (union organizer who was praised for the quality of his work as a welder); *Columbia Engineers Intl.*, 249 NLRB 1023, 1028 (1980); *Henlopen Manufacturing Co.*, 235 NLRB 183, 184 (1978); and (e) who were full-time employees of the union, and apparently turned all wages earned over to the union, *e.g.*, *Oak Apparel, Inc.*, 218 NLRB 701, 702, 704-707 (1975) (paid organizers who, while employed, "performed their duties ably and diligently"); *Anthony Forest Products Co.*, 231 NLRB 976, 976-77 (1977); *Escada (USA) Inc.*, 304 NLRB 845, 845-47 (1991). *Cf. Lyondale Manufacturing Corp.*, 238 NLRB 1281, 1283 (1978) (paid organizer asked by union to obtain job in order to organize co-workers, but never engaged in organizing activities).

formance of job tasks for the employer, or on the individual's obligation to abide by all valid workplace rules established by the employer. Put another way, nothing in any obligation the individual assumes to the union by reason of any of these factors is inconsistent with full performance of all valid obligations imposed by the employer as a requirement of initial employment and as a precondition to continued employment.

Nonetheless, under the theory adopted below, where the pertinent factors singly or in some combination are present, the individuals affected—because not "employees" under the NLRA—can be refused employment or discharged by an employer in a manner that "interfere[s] with, restrain[s] or coerce[s] employees in the exercise of the rights guaranteed in section [7]", or on a basis that "by discrimination in regard to hire or tenure of employment . . . discourage[s] membership in any labor organization." §§ 8(a)(1) and (3), 29 U.S.C. §§ 158 (a)(1) and (3).

In this case, for example, the employer was *not* aware of any of the factors that are now claimed to divest the discriminatees of the Act's protections: The applications for employment here made evident to the interviewers—who were aware of the union and nonunion status of competing employers—that the individuals in question were union members. *See* p. 4, *supra*. But nothing in those applications—or in those interviews which were held—indicated that the applicants were union officials, paid or unpaid; that their intention was to take the job in order to organize a union if hired; that they might at some indeterminate time in the future resign their employment at their union's behest; or that they would in any sense be paid by the union for union activities while employed. Further, as to Hansen, who was hired and then discharged for union activity, the evidence shows that the employer, in making the discharge, was aware only of Hansen's union membership and intent to organize his

co-workers (and, indeed, that Hansen himself was not aware, until after he was discharged, that the union planned to reimburse him for the difference between union and non-union wages). Jt. App. 68.

The employer's actual intention, as the Board found on these facts, was to refuse employment to union members *qua* union members, and to remove from its worksite any individual engaged in active lawful union organizing activity. Thus, as in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995), decided this term under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.,

> [this] case comes [to this Court] on the express assumption that an unlawful motive was the sole basis for the firing [and for the failure to hire] . . . The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired [or not hired] for [a] nondiscriminatory reason.[10]

And, under NLRA §§ 8(a)(1) and (3), as under the ADEA, "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" for when discharges or failures to hire deter protected activities and thereby violate the Act. *Teamsters v. NLRB*, 365 U.S. 667, 675 (1961); *see also Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954) ("true purpose is the subject of investigation" in discriminatory hiring and discharge cases), quoting *NLRB v. Jones & Laughlin*, 301 U.S. at 46.

In short, in this case *the employers fully intended to commit acts that violate a core premise of the statute, with the requisite bad motive.* According to the employers' theory, it is nonetheless the case that because the discriminatees are not "employees" covered by the Act, there was no violation of the Act. The question before the Court is whether there is any support in the statutory materials for this understanding of the term "employee." We submit that there is none whatever.

[10] *McKennon* held that an employee does not lose the protections of the ADEA to be free of prohibited age discrimination where the employer finds out, after a discriminatory discharge, that there were grounds upon which the employee could and would have been fired before that discharge had the employer known about those grounds.

I. THE COURT OF APPEALS' CREATION OF AN IMPLICIT EXCEPTION TO THE NLRA § 2(3) "EMPLOYEE" DEFINITION HAS NO BASIS IN THE STATUTE OR ITS LEGISLATIVE HISTORY, AND IS INCONSISTENT WITH CORE NLRA POLICIES.

1. Since the court below held that the discriminatees in this case are not covered by the NLRA because they are not "employees," the pertinent section of the Act is the one that defines "employee", § 2(3). That definition reads as follows, in full:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. [29 U.S.C. § 152(3).]

It is a commonplace in statutory interpretation that "the starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). *See*

United States v. Alvarez-Sanchez, 114 S. Ct. 1599, 1603 (1994); *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). Indeed, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

For historical reasons, this general rule has special pertinence to the interpretation of NLRA § 2(3). For "the legislative history of § 2(3) itself" indicates that the term "employee" is to be interpreted in accord with "its plain meaning embracing . . . those who work for another for hire." *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

As explained in *Pittsburgh Plate Glass*, under the original Wagner Act, this Court, in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), took the view that the term "employee" in the statute is to be interpreted "in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Id.* at 129, quoted in *Pittsburgh Plate Glass*, 404 U.S. at 166-67.[11] In enacting the Taft Hartley Act in 1947, Congress rejected *Hearst*'s approach, based on "reference to the purpose of the Act and the facts involved in the economic relationship" (322 U.S. at 129), by amending the definition of "employee" in § 2(3) so as to exclude from the defined class "any individual having the status of an independent contractor."

In so doing, the 1947 Congress, as *Pittsburgh Plate Glass* recounted, stated an intention that § 2(3) be interpreted " 'according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone' . . . [as] someone who works for another for hire." 404 U.S.

[11] The precise question before the Court in *Hearst Publications* concerned whether individuals regarded as independent contractors, not employees, under common law standards could nonetheless be considered "employees" under the NLRA.

at 167, *quoting* H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947). As the House Report on the 1947 amendments explained:

> It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . "Employees" work for wages or salaries under direct supervision. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give every word in the act whatever meaning it wished. On the contrary, *Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.* [H.R. Rep. No. 245, *supra*, at 18, *quoted in Pittsburgh Plate Glass*, 404 U.S. at 167-68 (emphasis supplied).][12]

See also NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968) ("the obvious purpose" of the 1947 amendment to the definition of "employee" was "to have the Board and the courts apply general agency prin-

[12] The "independent contractor" amendment to the employee definition in the Taft Hartley Act originated in the House and had no analog in the Senate bill. The conference agreement incorporated the House amendment, with the House conference report indicating that in the future "ordinary tests of the law of agency" were to govern. H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB, History of the Labor Management Relations Act of 1947 ("LMRA Leg. Hist."), at 536.

The Taft Hartley Act also amended the definition of "employer" and added a definition of "agent," so as to incorporate for purposes of defining the responsibility of both employers and labor organizations "the ordinary common law rules of agency." *See* H.R. Rep. No. 245, *supra*, at 11, 68, *reprinted in* 1 LMRA Leg. Hist. at 302, 359; *see also* H. Conf. Rep. No. 510, *supra* at 36, *reprinted in* 1 LMRA Leg. Hist. at 540. *See also* H. Conf. Rep. No. 510, *supra*, at 36.

Thus, the 1947 Congress determined that as to agency-related issues generally, traditional common law concepts were to govern under the NLRA.

ciples"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518, 1349 (1992) (holding that in light of Congress' overruling of *Hearst* and the parallel overruling of *United States v. Silk*, 331 U.S. 704 (1947), "Congress means an agency law definition for 'employee' unless it clearly indicates otherwise").[13] Thus, since 1947 the Board has been under specific Congressional directions to interpret the "employee" definition according to its plain language and against the traditional agency law understanding of the term.

2. Interpreted "according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone" (H.R. Rep. No. 245, *supra*, at 18), the language of the § 2(3) definition of "employee" fully supports the Board's conclusion that the discriminatees in this case would, once hired, be "employees" of the employers.

(a) First, the dictionary definitions reveal that the "ordinary meaning" of "employee" includes any individual "who is hired by another, or by a business firm, etc. to work for wages or salary," *Webster's New Universal Unabridged Dictionary*, 595 (1983); anyone "employed by another," "under wages or salary," *Webster's Third New International Dictionary*, 743 (rev. 1971); or anyone "who works for another in return for salary, wages, or other consideration," *Funk & Wagnalls Standard College Dictionary*, 433 (1973).

As noted, both Congress and this Court have adopted this broad and straightforward understanding of NLRA § 2(3), stating that the NLRA "employee" definition extends to that class of individuals "who work for another for hire." H.R. Rep. No. 245, *supra*, at 18; *Pittsburgh*

[13] *Silk* had followed the *Hearst* approach in interpreting the term "employee" in the Social Security Act. For an account of the Congressional reaction to *Silk* and the subsequent amendment to the Social Security Act, *see United States v. W.M. Webb, Inc.*, 397 U.S. 179, 183-88 (1970).

Plate Glass, 404 U.S. at 166. This definition delineates a class which encompasses all individuals who are hired by an enterprise to perform labor for the enterprise's profit, under the enterprise's direction and supervision, and in return for compensation in wages from the enterprise. The definition does *not* look to the legal or financial relationships the individual may have with others, outside of the employee-employer relationship; nor to the individual's subjective motives for, or purposes in, entering into or continuing that relationship. Rather, the only question posed in applying the term "employee" is the objective one of whether the individual is performing labor for another as a hired worker.

Further, the legislative history of NLRA § 2(3) shows that Congress intended the term "employee" to have exactly the meaning these dictionary definitions provide. As passed in 1935, the structure and wording of NLRA § 2(3) were quite similar to the current version, although stating fewer specific categories of exceptions.[14] While

[14] As passed in 1935, § 2(3) stated as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual empoyed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse. [49 Stat. 450 (1935).]

This language remains the beginning of § 2(3) as currently drafted, but the current version includes the following additional language, added in 1947, which establishes additional categories of individuals excluded from the definition of "employee":

> , or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other

the legislative history of the provision contains no detailed analysis of its scope, the historical materials do contain repeated references to the broad underlying group of individuals intended to be covered. The repetitive refrain is that the Act uses the term "employee" to cover the general class of "workers", "wage earners" and "workmen" who perform labor in the workforces of "employers".[15] Thus, for example, Representative Connery, the floor manager of the bill, affirmed that the coverage extended to "every man on a payroll," 79 Cong. Rec. 9686 (1935), *reprinted in* 2 NLRB, Legislative History of the NLRA of 1935 ("NLRA Leg. Hist."), at 3119 (1935); *see also* 2 NLRA Leg. Hist. at 3120 (coverage extends to "every individual on [the] employer's payroll").

The 1947 Congress likewise made it clear that under the amended § 2(3) the term "employee" was still to extend broadly to that class of people who "work[] for another for hire," or who "work for wages or salaries under direct supervision." H.R. Rep. No. 245, *supra*, at 18. There is nothing in the 1947 debates that would give any support to the notion that the term "employee" should be given any nontraditional meaning that would look to an employee's motivation for, or purpose in, working for an employer or to factors that are external to the objective relationship of the worker and the enter-

person who is not an employer as herein defined. [61 Stat. 137 (1947).]

The employers here have never argued that any of these exclusions are relevant to this case.

[15] *See, e.g.*, Hearing on S. 1958 Before the Senate Comm. on Educ. and Labor, 74th Cong., 1st Sess. 42, 56, 78 (1935), *reprinted in* 1 NLRB, Legislative History of the NLRA of 1935 ("NLRA Leg. Hist."), at 1418, 1432, 1454 (1935); H.R. Rep. No. 969, 74th Cong., 1st Sess. 8 (1935), *reprinted in* 2 NLRA Leg. Hist., at 2917-18; 79 Cong. Rec. 9714, 9719, 9732-33 (1935), *reprinted in* 2 NLRA Leg. Hist., at 3186, 3198, 3230-32. *See also* H.R. Rep. No. 245, *supra*, at 13 (intent of Congress in passing the NLRA was to protect the welfare of "workers" and "wage earners").

prise for whom he works regarding the work to be performed.

The very language and structure of § 2(3) are the best evidence of Congress' intention to embrace *all* those who meet that objective test other than those specifically excepted in § 2(3) itself:

> *The breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee". The only limitations are specific exemptions* for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. [*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (emphasis added).][16]

This Court has therefore consistently concluded that, absent some compelling reason otherwise, individuals who meet the ordinary dictionary definition of "employee" and who are not affirmatively excluded from the "employee" class in a § 2(3) exception, are covered by the NLRA.

For example, in *Sure-Tan*, *supra*, the Court rejected the contention that undocumented aliens—performing work for hire under an enterprise's supervision and control—should not be considered § 2(3) "employees": "Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly

[16] The Court's approach in *Sure-Tan* and other case reflects the well-established rule of statutory construction under which the "enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded," 2A Singer, *Sutherland Statutory Construction* § 47.23 (1973 & Supp. 1983). Under this canon, there can be no doubt that the term "any employee" is to be given its broadest meaning, limited only by the statute's enumerated exceptions. The Court has followed this same rule of construction in interpreting the closely analogous definition of "employee" in the FLSA, 29 U.S.C. § 203(3). *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 516-17 (1950) (same); *see also Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 299-30 (1977).

come within the broad statutory definition of 'employee'." *Sure-Tan*, 467 U.S. at 892.

Similarly, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), refused an invitation to import into § 2(3) an exception for all employees having access to confidential business information, noting that "[u]nder a literal reading of the phrase 'any employee,' the workers in question are 'employees.'" 454 U.S. at 177.

The *only* occasion upon which this Court held that a group of individuals who might otherwise be "employees" are not within § 2(3) although not expressly excepted in the Act is *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974). In that case, the Court concluded on the basis of, *inter alia*, "the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act [and] consistent construction of the Act for more than two decades" (416 U.S. at 289) that Congress affirmatively evidenced an intention that managerial employees be excluded from the Act. *See also id.* at 274-75 (placing emphasis on the fact that Congress re-enacted the statutory definition in 1947 without change with an awareness of the Board's longstanding exclusion of managerial employees from the Act.)

Here, *none* of the factors relied upon in *Bell Aerospace* for adding an implied exception to the "employee" definition are present. No Board decision has ever recognized any categorical exception to the "employee" definition for individuals who by prearrangement act as union organizers, paid or otherwise. To the contrary, the Board has concluded that individuals who are otherwise "employees" do not lose that status because of organizing arrangements with a union. Here, as opposed to *Bell Aerospace*, there is simply no administrative exception to § 2(3) that the 1947 Congress could be said to have ratified.[17]

[17] The Board's decisions on this issue date back to *Algonquin Printing Co.*, 1 NLRB 264, 267-70 (1936) and *Waumbec Mills, Inc.*, 15 NLRB 37 (1939), *enf'd*, 114 F.2d 226 (1st Cir. 1940), which involved present and former union officers, and continue, in an unbroken line of precedents, with the cases cited in n.9, pp. 19-20, *supra*, and through the present case.

In short, the plain language and structure of § 2(3) dictate that individuals who perform economically valuable work for an employer, under the employer's direction and control, and are paid wages for so doing—including individuals who have organizing arrangements with a union —are "employees" within the meaning of § 2(3) of the Act.

(b) "The law as the courts have stated it"—that is, the common law—mirrors the ordinary dictionary meaning of the term "employee."

The Restatement (Second) of Agency has been repeatedly referred to by this Court as "a guideline for analysis" with regard to "the general master-servant relationship" and, in particular, with regard to "analyzing the three-party relationship between two employers and a worker." *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974). The Restatement "defines a servant as 'a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.'" *Id.* at 324, *quoting* Restatement (Second) of Agency, § 220(1) (1957). *See also*, Restatement of Agency (First) § 220(1) (1937) (same); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (relying on the Restatement as the primary source for defining the words "employee" and "employed" consistently with common law principles); *Ward v. Atlantic Coast Line Ry. Co.*, 362 U.S. 396, 400 (1960) (same).

Similarly, *Black's Law Dictionary*, drawing on common law authorities, defines "employee," as "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed, . . .

[o]ne who works for an employer; a person working for salary or wages." *See Black's Law Dictionary* 471 (5th ed. 1979).

And, a leading legal encyclopedia states that, under the common law of agency, an employer-employee relationship is established whenever "one engages another to perform certain work, retaining control of the conduct of the person thus engaged with respect to the work to be done or the order, method, and plan of the work." 53 Am. Jur. 2d, Master and Servant, § 5 (1970).

None of these sources treats as remotely relevant any additional legal or financial relationships the worker may have with others, or any subjective motives or purposes that a worker may have regarding his employment. As long as the worker, once hired, continues to be employed to perform labor under those objective conditions normally associated with "employee" status, the worker continues to be an "employee" with respect to the labor in question.

That such additional relationships and such subjective motives are irrelevant was made explicit in the first Restatement of Agency, which was promulgated in 1933 and thus reflected "the meaning[] [of the "employee" concept] . . . when Congress passed the act." H.R. Rep. No. 245, *supra* at 18.[18] On a point that is highly relevant here—and in a provision that was relied upon by the Board below (Pet. App. 28a)—the first Restatement made clear that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (First) of Agency § 226.[19]

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[18] The current version of the Restatement of Agency—the Second—is in all relevant respects identical to the Restatement (First) with regard to the "servant of two masters" issue. *Compare* Restatement (First) of Agency §§ 220, 226 (1933) with Restatement (Second) of Agency §§ 220, 226 (1957).

[19] This Restatement section was cited approvingly in *Kelley, supra*, 419 U.S. at 322; *see also Williams v. Pennsylvania R. Co.*, 313 F.2d 203, 209 (2d Cir. 1963).

An illustration given in both Restatements makes clear how close the facts of the instant case are to the situation envisioned by the Restatements. The illustration discusses a delivery boy who simultaneously works for two employers making deliveries along the same route, with "neither [employer] know[ing] of the employment of the other." Despite the simultaneous employment arrangement, and despite the worker's failure to disclose the arrangement to either employment, the Restatement makes clear that the delivery boy is simultaneously an employee of both employers while riding along the common route. Restatement (First and Second) § 226 illus. 2.

The Restatement's explanation of this result is straightforward, and has nothing to do with any complex analysis of either employer's abstract interests: "[S]ince one can perform two acts at the same time," and since "a single act may be done to effect the purposes of two independent employers," the law recognizes simultaneous employment by independent employers, even where one or both of the employers are unaware of—and would disapprove of—the other employment relationship. *Id.*, cmt. a, "independent service for two masters".

A similar, and arguably even closer, illustration of simultaneous employment is given in Professor Seavey's leading treatise on the law of agency. Seavey gives the example of a police detective who obtains undercover employment as a waiter to investigate the customers of a restaurant. In such a circumstance, the treatise makes clear, the individual *is* an employee of both the city and the restaurant. *See* W. Seavey, *Handbook of the Law of Agency*, § 85 (1964) ("One can be a servant of one person for some acts and the servant of another for other acts, even when done at the same time, as where a city detective, in search of clues, finds employment as a waiter and, while serving the meals, searches the customer's pockets. In the first, he is servant of the restaurateur, in the second, of the city").

For present purposes, the pertinent point in Seavey's example is that the detective is the owner's employee for as long as he or she remains employed so that, for example, the owner is responsible if the detective trips a patron negligently while waiting tables (but not, apparently, if the detective rips a customer's pocket while searching it). As in Seavey's example, the fact that an employee-union organizer may undertake employment with an employer because doing so is essential to further his organizing aims does not change the conclusion that he is the employer's employee with respect to the work carried out on behalf of that employer during work time.

Thus, for tort purposes, for example, Town & Country would have been liable had Hansen negligently caused injury to a passerby while performing electrical work at the Boise Cascade site, since Hansen was working for the employer as an employee while performing that work. At the same time, had Hansen injured a fellow employee by negligently tripping him while soliciting for the union on nonwork time, the union might be liable, but Town & Country presumably would not be.

It is important to note that the Restatement goes on to specify that simultaneous employment arrangements may, depending on the circumstances, constitute a "breach of duty" by the employee with respect to "one or both" of his employers. Restatement (First and Second) § 226 cmt. a. But the Restatement authors could not be clearer that the issue of employee *status* is separate from the issue of employee *breach of duty*. As the Restatement explains, under the common law of agency, "[a] person . . . may cause both employers to be responsible for an act"—the person may have the status of "employee" with respect to both employers—even when the person has committed "a breach of duty to one or both of them." *Id.*[20]

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[20] Seavey's hypothetical is a possible example of a breach of duty by a dual employee, since the dual employment described

(c) Despite all this, the Eighth Circuit read the common law principles as supporting its conclusion, stating:

> Under common law, an agent has a duty to act solely for his principal in all matters connected with his agency. Restatement (Second) of Agency § 387 (1957). More specifically, an agent is subject to a duty not to act on behalf of a person or entity whose interests conflict with those of the principal in matters in which the agent is employed. *Id.* § 394. Pursuant to this obligation, a person may be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other. *Id.* § 226. Ordinarily, however, the control a master can properly exercise over the conduct of a servant prevents simultaneous service for two independent employers. *Id.* cmt. a. [Pet. App. 8a.]

Before analyzing the Eighth Circuit's common law discussion in detail, it is worth spelling out once more the consequences if this analysis is correct: The *same* common law concepts that govern "employee" status under the NLRA govern "employee" status in such diverse legal contexts as tax liability and *respondeat superior* responsibility in tort (*see* pp. 17-18, *supra*). If the Eighth Circuit were right in its analysis then Town & Country would have been absolved from paying social security taxes and FUTA taxes on Hansen's wages and, if Hansen's electrical work had been so negligent as to cause major damage to Boise Cascade's property, or to a passerby,

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may well entail an inherent breach of duty to the restaurant owner giving rise to a cause for discharge. Put another way, poking into customer's pockets for the benefit of a third party would seem to be an obvious breach of one's duties as a waiter and a breach of a duty of loyalty to the restaurant owner. Under the NLRA, in contrast, organizing a union in accord with valid no-solicitation rules cannot be deemed a breach of an employee's duties or constitute a basis for discharge. *See* pp. 40-41, *infra*.

Town & Country would not have been liable for the damages caused.

The improbability of these results in itself strongly suggests that the Eighth Circuit's analysis cannot be correct. Not surprisingly, then, for three reasons, the Eighth Circuit's analysis of the application of common law principles to this case is quite simply a mischaracterization of those principles.

First, the Eighth Circuit's discussion of the common law of agency confuses the issue of employee *status* with the issue of employee *duty*. As we have explained, under the common law, an individual can simultaneously hold the status of employee with respect to more than one employer, even where the employee created this arrangement without the knowledge of one or more of the employers, and even where the employee's actions in this regard might constitute a breach of duty to one or more of the employers. *See* pp. 10-11, *supra*.

The Eighth Circuit ignored this distinction. Instead, that court quoted from sections of the Restatement concerning an employee's duties of loyalty to his employer. *See* Pet. App. 8a. But as other sections of both the First and Second Restatements make clear, "one may be an agent for another although he violates his fiduciary duty to the other in acting as such." Restatement (First and Second) § 23 cmt. a; *see also id.* (emphasis supplied) ("One whose interests are adverse to those of another may be authorized to act on behalf of the other; it is a *breach of duty* for him to so act without revealing the existence and extent of such adverse interests."); Restatement (First and Second) § 226 cmt. a.

An example from a recent decision of this Court illustrates the distinction between employee *status* and employee *breach of duty*: In *McKennon, supra,* the employee, a confidential secretary, took confidential documents from the company, showed them to her husband, and kept them for her own purposes, which were adverse

to those of the company. 115 S. Ct. at 883. This conduct certainly constituted a breach of an employee's common law duty of loyalty to the employer, and this Court assumed that the "misconduct . . . was so grave that McKennon's immediate discharge would have followed" on its discovery. *Id.* After that breach, however, Ms. McKennon remained an "employee" for all purposes, including for purposes of the ADEA, during the period she continued to be actually employed. In other words, had Ms. McKennon during that period organized a union and been fired for that reason, an argument by the employer that Ms. McKennon was not an employee covered by the NLRA because of her breach of the duty of loyalty in taking the documents would have fared no better than the employer's similar defense to an ADEA discrimination cause of action fared on the actual facts before the Court in *McKennon*.

The Eighth Circuit's second error with regard to the common law was that court's notion that the "servant of two master" section of the Restatement itself recognizes that a conflict of interest precludes dual employment.

The court of appeals' discussion of this point begins with an erroneous paraphrase of the comments to the "servant of two masters" section so as to suggest that the presence of some "conflict" between the service to one and the service to another eliminates the employment relationship. Pet. App. 8a. The section, however, actually speaks *only* of "abandonment," not of "conflict." Restatement § 226, *supra*. The difference is a critical one.

Hansen, for example, can *not* be said to have *abandoned* his service to Town & Country between the time he was hired and the date of his discharge. To the contrary, he reported to work daily and, the ALJ found, performed his assigned tasks properly. *Compare, e.g.*, C.J.S. Employer-Employee Relationship § 51 (1992) (Abandonment of Employment by Employee) (abandonment co-

terminous with "refusal to serve," referring to, e.g., retirement or absence from work for unreasonable period).[21]

To be sure, the common law of the employment relationship incorporates, as a limitation on *respondent superior* liability, the concept that such liability ceases when the employee leaves the "scope of employment." And, the "scope of employment" concept might be said to be at least tenuously related to the "abandonment of service" limitation in Restatement § 226.[22] But employee-union organizers such as Hansen have in no sense left their scope of employment because of their relationship with the union.

The Restatements make clear that "[c]onduct may be within the scope of employment although done in part to serve the purposes of . . . a third person". Restatement (First and Second) § 236. Specifically, where "the servant, although performing his employer's work, is at the same time accomplishing [the] . . . objects . . . of a third person which conflict with those of the master", the conduct is still within the scope of employment. *Id.*, cmt. a.

Here, there is no doubt that Hansen, for example, was "performing [Town & Country's] work" while employed by the company, even if part of his motive in so doing was to get to help organize his fellow employees for the union. The proposition that "*ordinarily* the control which

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[21] The Restatements do not define the term "abandonment."

[22] *See, e.g., Higgins v. Western Union Tel. Co.*, 50 N.E. 500, 502 (N.Y. 1898) ("Beyond the scope of his employment the servant is as much a stranger to his master as any third person . . . [I]f the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended and an act of the servant during such interval is not to be attributed to the master."); *see also Holder v. Haynes*, 7 S.E.2d 833 (S.C. 1940); *Rogers v. Town of Black Mountain*, 29 S.E.2d 203 (N.C. 1944); *Master Auto Service Corp. v. Bowden*, 19 S.E.2d 679 (Va. 1942) (same).

a master can properly exercise over the conduct of the servant would prevent simultaneous service for two independent persons" (Restatement (First and Second) § 226 cmt. a (emphasis supplied)), is, as its language suggests, a qualified one.[23] And, here, the union had no interest, in controlling in any way Hansen's conduct with regard to the performance of electrical work during working time. Rather, the union's interest was, as the Board noted, that Hansen perform that work to the employer's complete satisfaction, so that Hansen could stay on the job and continue the organizing activity. (Pet. App. 37a). Thus, except for the critical fact that, as discussed below, there is, in fact, *no* cognizable conflict between the union's organizing interests and the employer's interest, the present situation is precisely the one described in Restatement § 236.

Third, and finally, the Eighth Circuit's common law discussion assumes a conflict of interest between the union and the employer, but does not specify what that conflict is. Insofar as the assumption is that there is a conflict between the union and the employer as to the performance of actual tasks by a union member working for the employer and organizing for the union, we have shown that that is simply not the case: The union is in no way asserting the authority to divert the employee from full performance of his or her obligations as an employee doing work for the employer while employed. Indeed, if the employee does default with regard to those obligations, she can be discharged without violating the NLRA.

Consequently, the Eighth Circuit's unarticulated premise must be that employee union organizing is, without more, "act[ivity] on behalf of a person or entity whose

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[23] The Eighth Circuit paraphrased this sentence as the last part of its discussion of the common law (Pet. App. 8a), but took no notice of the fact that the present situation is not the "ordinary" one, for the reasons discussed in the text.

interests conflict with those of the principal in matters in which the agent is employed." Pet. App. 8a. But that premise is in no way limited in its application to individuals who are *paid* by the union for their organizing activity or who undertake employment with an employer with an intention from the outset to organize.

Thus, if the Eighth Circuit were right that employers are entitled to regard employee union organizing activity as a breach of the duty of loyalty to the employer, non-union employers could decline to hire or, in the alternative, could discharge *any* employee, who engages in organizing activity on behalf of a union while employed. That turns the NLRA upside down: Far from comprising an actionable breach of a duty of loyalty to an employer, such employee union organizing activity is, of course, affirmatively protected from employer interference, including interference through discharge or refusal to hire.

The NLRA's findings and declaration of policy make this plain.[24] Section 7 of the Act declares "the right to self-organization, to form, join, or assist labor organizations". Section 8(a)(1), in turn, declares it an unfair labor practice to interfere with that right. And, § 8(a)(3) has been understood from the earliest days of the Act to forbid employers to refuse to hire employees because of fears that, if hired, they might undertake to organize on behalf of a union.[25] *Republic Aviation, supra,*

[24] "The denial by some employers of the right of employees to organize" is one of the causes of the labor unrest the NLRA seeks to correct; "[e]xperience has proved that protection by law of the right of employees to organize . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest"; "[i]t is hereby declared the policy of the United States . . . [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." NLRA § 1, 29 U.S.C. § 151.

[25] For example, in *NLRB v. Waumbec Mills*, 114 F.2d 226 (1st Cir. 1940), an employer denied employment to two former union officers, one of whom was still an officer of an organization affiliated with the union, because " 'we don't want no union and we don't want no trouble.' " 114 F.2d at 230. The First Circuit upheld the Board's finding that employment cannot, under the Act, be denied because the applicants for employment " 'had previously been union leaders and had taken an outstanding part in concerted activities for mutual aid and protection.' " *Id.* at 231. (*Waumbec Mills* was described in *Phelps Dodge, supra,* as an "able opinion" (313 U.S. at 186 n.5), and that opinion's reasoning was closely followed in *Phelps Dodge.*) Obviously, the employer's implicit contention in *Waumbec Mills* was that the applicants in question might undertake, if hired, to organize on behalf of the union, and that that concern should be a valid basis for denying them employment; it is that contention that was rejected. *See also, e.g., NLRB v. Botany Worsted Mills,* 106 F.2d 263 (3d Cir. 1939) (discharge of an employee because he solicited for the union during work time a violation of then-§ 8(3), where other forms of solicitation during work time were tolerated); *Phelps Dodge,* 313 U.S. at 193 (Act must be construed so that "men . . . leading efforts at organization" can be reinstated even if they had obtained equivalent wages elsewhere, in order to "encourag[e] the right of self-organization.")

and its progeny, as we have seen, therefore affirmatively protect the right of employee-union organizers to approach fellow employees at appropriate times and places to solicit union membership. *See, e.g., Central Hardware Co. v. NLRB,* 407 U.S. 539, 542-43 (1972); *Beth Israel Hospital v. NLRB, supra,* 437 U.S. at 491 (1978).[26] Put another way, while the NLRA incorporates the common law's general definition of "employee", it does not incorporate, but instead *expressly overrides,* any concept that an employee's union organizing activity can be regarded as a breach of a duty of loyalty to the employer and therefore a basis for discharge or refusal to hire.

[26] *See also, e.g., Abbey's Transp. Services Inc. v. NLRB,* 837 F.2d 575, 581 (2d Cir. 1988) (employer could not consider organizing efforts to be evidence of "disloyalty"); *Texaco, Inc. v. NLRB,* 462 F.2d 812, 814 (3d Cir.), *cert. denied,* 409 U.S. 1008 (1972) (same).

In short, as the Board observed in its decision in this case, "[n]o coherent policy considerations" have been advanced on the employers behalf "that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization." Pet. App. 33a-34a.

II. SECTION 2(3) OF THE NLRA AS PROPERLY CONSTRUED BY THE NLRB IN THIS CASE DOES NOT IMPAIR ANY LEGITIMATE EMPLOYER INTEREST.

The arguments by the employers in this case and others like it have devoted scant attention to the determinative considerations discussed above—the actual language and structure of § 2(3), read against that section's legislative history and the common law which that history directs the Board and the courts to apply, and against the NLRA's core protection of § 7 organizational activity.

Those arguments instead have been cast in terms of "fairness" and "sound policy." Treating individuals who are working at a construction job or who are ready, willing and able to do the work and are applying for such a job *and* who have a purpose to engage in lawful union organizing activities, or have agreed with a union to engage in such activity, or are being paid by a union to engage in such activity, as part of the same class as other individuals doing such work or making such applications—*viz.*, as members of the NLRA § 2(3) class of "employees"—is, it is claimed, both unfair to employers and bad labor policy.

1. Before considering this line of argument in its own terms, two preliminary points are, we believe, critical.

The first is the obvious point that ultimately the statutory materials must be controlling, whatver view one takes of the wisdom of the Congressional choice. Even

if "the tactics used here deserve condemnation" (which, for reasons we recount below, they do not) "this would not justify attempting to pour that condemnation into a vessel not designed to hold it." *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 496 (1960); *see also id.* at 500.

The definition of "employee" in NLRA § 2(3), as we have shown, was not designed to and simply will not bear the construction the Eighth Circuit placed upon it. Nothing in that definition calls for the scope of the term "employee" to be determined according to whether it is in some subjective sense "appropriate" or "fair" for a particular subclass of individuals to be a part of the workforce. The category of "employee" simply applies to all those who in fact *are* in the workforce. *See* pp. 23-31, *supra*. This means that one may certainly be an "employee" despite the fact that one continues in the job for secondary, personal motives, despite the fact that one has the undisclosed intent to leave shortly, and despite the fact that one takes the job at the request of another. While these factors may well make a worker far less than an ideal "employee" (from an employer's perspective), and while these factors may well motivate—and in some instances justify—an employer's decision not to hire or retain the "emplovee," they do not deny the individual the status of an "employee." *Cf. Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 90 (3d Cir. 1943), *cert. denied*, 321 U.S. 778 (1944) (treating hired worker as "employee" under the Act despite the fact that he did not perform his job functions, disrupted the work of others, ignored company rules, and "[i]f ever a workman deserved summary discharge it was he").[27]

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[27] In *Sure-Tan*, *supra*, for example, this Court affirmed the Board's inclusion of undocumented aliens within the category of "employees" despite the illegality of their very presence in the country. Although such individuals might well be considered "inappropriate" for inclusion within an employer's hired workforce, the Court had no difficulty holding that illegal aliens actually

Second, under the NLRA, employers can set their own employment conditions, as the employer sees fit, subject to only two limitations—that the employer not discriminate against union members and union activists *qua* member or activist and not take actions that interfere with the exercise of § 7 rights. Subject to those limitations, today as in 1934, employers can as far as the NLRA is concerned follow such employment policies governing hiring qualifications and the conditions of continued employment as the employer believes further its interests.

In particular, to the degree that an employer is concerned with assuring a particular tenure of employment, the NLRA definition of "employee" in no way governs or precludes the employer's negotiation, as a neutral condition of employment applicable to union members and nonmembers alike, of a promise to stay in his employ for a specified time period. Absent such an agreement, however, it is also true that nothing in the NLRA overrides the usual employment law rule "that contracts of employment which mention no period of duration . . . are terminable at the will of either party." 53 Am. Jur. 2d Master & Servant § 27; *see also, e.g.*, 30 C.J.S. Employer-Employee Relationship § 39 ("an employment for an indefinite term may be terminated at the will of either party, regardless of the length of service, for or without cause, and without giving any reason or explanation").

This principle of mutual at-will employment relationships does not draw distinction as to *why* an employee

working for an employer "plainly come within the broad statutory definition of 'employee.'" 467 U.S. at 892. The Court emphasized that, despite its holding regarding "employee" status, an employer remains free to refuse to hire undocumented aliens or to discharge or report them to the authorities because of their undocumented status, as long as the employer does not act from those anti-union motives prohibited by the substantive provisions of the NLRA. *Id.* at 895.

chooses to leave employment at a given time, whether pursuant to a prior plan that existed at the time the employment began or in accord with an agreement with a third party. Thus, to the extent that an employer is concerned that the law allows employees to harbour unrevealed commitments that may cause them to leave sooner than the employer might desire, the employer's complaint is with the common law and with his own failure to provide a contract of employment sufficient to override the presumption of at will employment, not with the NLRA.

Indeed, nothing in the present context is at all unusual. Many employees have, at the time they take a position, plans for their own lives or obligations to third parties, not known to the employer, that will preclude indefinite employment. For example, an employee may be on layoff from another job, with a commitment to the former employer to return to the old job when a position becomes available (and, often, with inducements offered such as preservation of benefit credits or re-entry at the employee's prior seniority status). Or an employee may have accepted an offer of admittance to an academic institution for the following term, and put down a deposit which will be lost if she does not attend. Other examples would include a commitment to a spouse to move if the spouse is offered a position elsewhere which offers financial advantages to the couple, or a commitment to one's family to resign from one's job if asked to do so in order to take over the family business.

The understanding of the law is that, absent an agreement to the contrary, the employer properly has the burden in any of these cases of hiring another employee should the unknown contingency actually arise and the present employee leave the job.[28]

[28] If a durational requirement were set by the employer and accepted by the employee, the individual hired would be a *temporary* employee, but would still be an *"employee"* for NLRA purposes. *See Pennsylvania Electric Co.*, 289 NLRB 1260 (1988); *EDP*

What is at stake here, then, is not whether employers are to be allowed to run their workplaces in accord with neutral rules designed to assure productivity and discipline, but whether employers are to be allowed to discriminate on the basis of union membership and to interfere with § 7 activity with regard to certain individuals who on every count *are* NLRA § 2(3) employees.

2. With that lengthy preliminary we now return to the employers' arguments in this species of case that it would be unfair and contrary to sound policy to include individuals with certain kinds of relationships with a union in the § 2(3) "employee" class and meet those arguments on their own terms.

First, there is the contention that it is unfair to require an employer to hire or retain an individual who undertakes work for an employer with the purpose of organizing on behalf of a union. Under the NLRA, however, an employer is not free to define a required duty of "loyalty" and "commitment" that precludes union commitments consistent with the performance of the employee's job duties. *See* pp. 44-45, *supra; see also, e.g., Peyton Packing Co.*, 49 NLRB 828 (1943).

Medical Computer Systems, 284 NLRB 1232 (1987); *see also Sunland Const. Co.*, 309 NLRB at 1229 n.3.

We note that it not surprising that the employer in this case, as a construction industry employer, did not impose any durational requirement as a condition of employment. Construction industry employment is usually on a job-by-job transitory basis in any event, and the job at Boise Cascade could have lasted as little as three months. Pet. App. 50a. There is absolutely no basis for believing that any union organizing campaign would have lasted less than three months, or that Hansen would not have agreed in good faith to a three-month durational requirement had he been asked. And, of course, had the organizational campaign succeeded, the union rule against employment with a nonunion employer would have ceased to apply, and Hansen would have had no union-related reason to leave. In short, given the transience of employment in the construction industry, the notion that an employer in that industry has an overiding interest in assuring long-term job tenure belies reality.

Nor, does the employer have a just complaint if the individual is acting under a union rule that limits working non-union to members who commit to active organizing. Unions are entitled, under the NLRA, to advance legitimate union interests by promulgating internal rules applicable to all union members. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969). The union interests advanced through such means are not always congruent with employer interests. Indeed, those lawful rules in some instances impose the obligation to leave work—that is, to strike. *Allis-Chalmers, supra.* Plainly a union rule prohibiting non-union sub-standard work advances a legitimate union interest. *Cf., Florida P.&L. v. Electrical Workers*, 417 U.S. 790, 793, 805 n. 16 (1974). And, that is true of the more nuanced rule at issue in this kind of case. Both rules are thus within the protection of the proviso to § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). It follows that such rules can not be said to be contrary to sound labor policy.[29]

Second, the employers contend that any cash nexus between an employer/union organizer and the union is illegitimate and that this illegitimacy divests the individual of § 2(3) "employee" status. But the Board has long held, for example, that union stewards who perform workplace union functions—many of whom are paid by the union or receive rebates on dues[30]—are "employees" engaged in

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[29] In this regard, it is also to the point that under the NLRA, employees have the right to *negate* such union rules by resigning union membership. *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95 (1985). The union members who made up the bulk of the discriminatees in this case could, under *Pattern Makers*, have resigned from the union once employed should they prefer to continue working for the nonunion employer without being subject to the obligation to organize while they are doing so.

[30] While some union adherents have the time, commitment, and freedom from other responsibilities to undertake extensive union responsibilities without recompense, unions often provide some

fully protected concerted activities protected against employer interference. *See General Motors Corp.*, 218 NLRB 472 (1977). And, the Labor Management Relations Act and Landrum Griffin Act affirmatively recognize that unions may pay employees for union service when those employees are also working for, and being paid by, an employer covered by the Act. LMRA § 302(c)(1), 29 U.S.C. § 302(c)(1) (prohibition on employer payments to officers and employees of labor organizations does not apply to any such "officer or employee of a labor organization who is also an employee or former employee of such employer"); 29 U.S.C. § 432(a)(5) (requiring that officers and employees of labor organizations report any financial transaction with an "employer whose employees his organization represents or is actively seeking to represent except work performed and payments and benefits received as a bona fide employee of such employer").[31]

Indeed, there is no legally relevant difference between union members who advance union interests on the job in part because induced to do so by union payments, and union members who advance union interests on the job in part because induced to do so by union rules (enforceable, e.g., by fines) valid under the *Allis-Chalmers* line of cases discussed above. In both cases, the right of employees as a group through their unions to create such inducements is legitimate under the NLRA, and in both cases the individual affected can avoid the inducements and the obligations that go with it should he or she choose

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compensation for work undertaken on their behalf by union officers whose primary employment is at the plant or other work location where represented employees work. *See generally* Sayles & Strauss, *The Local Union* 67 (1967); Peck, *The Rank & File Leader* 32-34, 58-62 (1963); Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Employer Leave & Pay for Union Business* 4, 29 (1980).

[31] The latter provision's wording makes clear that Congress sees no distinction between employer payments to employees of unions not yet designated as the exclusive representative and such employer payments after a union has been so designated.

to do so, by resigning membership or resigning any paid union position.

In this the labor law recognizes that it is no less true for unions than for other nonprofit organizations that providing recompense to those who communicate with potential members and contributors can well be essential to successful communication. As this Court has repeatedly ruled, regulaiton of, and even disclosure concerning, the payments made to fundraisers for charity substantially inhibit charities in communicating with their potential donors, and therefore are inherently suspect. *Riley v. National Federation of the Blind*, 487 U.S. 781, 788-79 (1980); *see also Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980). And, as the Court added in *United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133, 4132-38 (February 21, 1995), "publishers compensate authors because compensation provides a significant incentive toward more expression."

Third, and finally, the employers argue that it is improper to treat paid union officials as § 2(3) employees. But it has been clear since the earliest days of the Act that employers may not impose special disqualifications on union officials, such as refusing to hire them although they are prepared to fulfill the duties of any employee. *Waumbec, supra*; *Metropolitan Edison Corp. v. NLRB*, 460 U.S. 693, 703 (1983) ("holding union office clearly falls within the activities protected by § 7 . . . and there can be little doubt that an employer's . . . imposition of discipline on union officials inhibit qualified employees from holding office"). Of course, like union members generally, union officials can resign and refuse further union payments if they would prefer not to advance the union's interests any longer.

In sum, more of the employers' attempts to override § 2(3)'s plain meaning on "fairness" or policy grounds provides a reasoned—much less a legitimate—basis for so doing.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

New Business—Mike Priam resended a new salting resolution. Motion was made, seconded and passed as follows:

SALTING RESOLUTION

WHEREAS: IBEW Local 292 is committed to organizing all unorganized craftsman working in our jurisdiction, and;

WHEREAS: a continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool and;

WHEREAS: a principal obligation of the members of the local union is to organize the unorganized in order to maintain and secure our wages, benefits and other conditions of employment and;

WHEREAS: the success of any organizing drive depends upon the support of each and every union craftsman, both on and off the job; Therefore be it

RESOLVED: that unemployed members shall report to the Business Manager for the purpose of assisting as needed in the organizing program, and be it further

RESOLVED: that the Business Manager be empowered to authorize members to seek employment by nonsignatory contractors if they are willing, in addition to the performance of work assigned by their employer, and as set forth below, to assist in the local union's organizing program, and be it further

RESOLVED: that the Business Manager shall maintain records of all members authorized to seek employment by nonsignatory employers including dates of authorization, dates of employment and all other pertinent information and be it further;

RESOLVED: that such members, when employed by nonsignatory employers, shall promptly and diligently carry out the electrical construction work assigned to them by their employer for the duration of the project, and shall engage in organizing their fellow employees only on non-work time, and/or in non-work areas and in accordance with any lawfully promulgated distribution and solicitation rules and be it further

RESOLVED: that such members, when employed by nonsignatory employers, shall be compensated by the local union only for the time spent organizing before or after working hours of the nonsignatory employer.

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this RESOLUTION, shall be subject to charges and discipline as provided by our constitution and bylaws.

Adopted by Local Union IBEW 292 membership this 11th day of October 1994.